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POM Wonderful LLC v. Coca Cola Company: Have the Tides Turned in the Legal Food Fight?

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"All Natural," "Low Carb," "Organic," "Real Fruit," "Whole Grain," "Non-GMO." In a world where consumers are increasingly fixated on purchasing "healthier" foods, manufacturers often incorporate these and other health buzz words into product names and marketing materials. Over the last decade, this promotional practice has been met with a flurry of consumer-driven false-labeling class action lawsuits. The U.S. Supreme Court's recent decision in *POM Wonderful LLC v. Coca Cola Company*, 134 S. Ct. 2228 (2014), 573 U.S. ___ (2014), No. 12-761, 2014 WL 2608859 (June 12, 2014), may alter this landscape, shifting some of the food and beverage label fight from consumers to competitors. It creates a new legal scheme for competitor suits and does nothing to lessen the significant barriers consumers face in bringing their claims.

The *POM Wonderful* Decision

POM Wonderful involved a lawsuit between competitors in the fruit-juice market. The U.S. Supreme Court granted certiorari to consider whether a private party may bring a Lanham Act claim, challenging a food label that is regulated by the Food Drug and Cosmetic Act ("FDCA"). *POM Wonderful LLC*, 2014 WL 2608859, at *7.

POM Wonderful LLC ("POM") makes and sells pomegranate juice products, including a pomegranate-blueberry juice. Coca-Cola Company ("Coca-Cola") manufactures and markets juices, including a pomegranate-blueberry juice blend, through Minute Maid. POM filed a lawsuit under section 43 of the Lanham Act, alleging that Coca-Cola's name, label, marketing, and advertising for its pomegranate-blueberry juice blend was false and misleading because Coca-Cola displayed the words "pomegranate blueberry" with more prominence than other text on the product label, the juice blend actually contained five juices, and only 0.3% and 0.2% of the juice blend was pomegranate juice and blueberry juice, respectively. *POM Wonderful LLC*, 2014 WL 2608859, at *3.

The Lanham Act, 15 U.S.C. §1051 *et seq.*, is the primary federal trademark statute in the United States. Section 43 of the Lanham Act, 15 U.S.C. § 1125, imposes civil liability on any person who "uses in commerce any word, term, name . . . or any combination thereof, or any . . . false or misleading description of fact, or false or misleading representation of fact, which—[¶] (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1)(B). Injunctive relief is available to any owner of a distinctive famous mark whose mark is subject to dilution due to another's use of a mark or trade name in commerce. 15 U.S.C. §

1125(c)(1). While consumers who feel "hoodwinked into purchasing a disappointing product . . . cannot invoke the protection of Lanham Act[,]" the injunctive relief it offers is available to competitors who "allege an injury to a commercial interest in reputation or sales." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014).

Given the facts of this case and the clear competitor relationship between POM and Coca-Cola with respect to pomegranate-blueberry juice blends, "POM's cause of action [under the Lanham Act] would [have been] straightforward enough but for Coca-Cola's contention that a separate federal statutory regime, the FDCA, allows it to use the label in question and in fact precludes the Lanham Act claim." *POM Wonderful LLC*, 2014 WL 2608859, at *4. Coca-Cola, in other words, argued that POM's claim was precluded.

The FDCA prohibits the misbranding of food and drink through false or misleading labels. 21 U.S.C. §§ 321(f), 331, 343. The Act, as amended by the Nutrition Labeling and Education Act of 1990 ("NLEA"), also preempts state misbranding laws that are of the type but not necessarily identical to the FDCA's branding prohibitions. 21 U.S.C. § 343-1.[1] Enforcement of the FDCA is "nearly exclusive[ly]" vested in the United States, as private parties may not bring enforcement suits. *POM Wonderful LLC*, 2014 WL 2608859, at *5 (citing 21 U.S.C. §§ 333(a), 337).[2] Relying on the FDCA, the Food and Drug Administration has promulgated regulations that require juice blends that fail to identify all components and instead emphasize non-predominant juices to either declare the percentage content of the named juice, or identify the named juice as a "flavor or flavoring." 21 C.F.R. § 102.33(d) (2013). Notwithstanding these specific regulations, the FDA does not preapprove juice labels. *POM Wonderful LLC*, 2014 WL 2608859, at *5 (citing Brief for United States as Amicus Curiae in Opposition 16).

Ultimately, the Court disagreed with Coca-Cola's preclusion argument. The Court framed the dispute as an argument over statutory interpretation, with POM taking the position that the Court must give full effect to both the Lanham Act and the FDCA because they are not in "irreconcilable conflict," and Coca-Cola contending that the FDCA clarifies or narrows the scope of the more general Lanham Act. *POM Wonderful LLC*, 2014 WL 2608859, at *7. Following a detailed analysis of the text of the two statutes, the Court held that the FDCA and the Lanham Act are complementary, and that the FDCA is not a ceiling on beverage and food labeling regulation that precludes Lanham Act suits by competitors. *Id*. at *9, *11-12. The Court also rejected the Government's arguments in its *amicus curiae* brief that the FDA's promulgation of a specific juice-naming regulation precluded private parties from filing lawsuits under the Lanham Act to force changes to competitor product labels. *Id*. at *11-12 ("[I]t is a bridge too far to accept an agency's after-the-fact statement to justify that result here. An agency may not reorder federal statutory rights without congressional authorization.").

POM Wonderful **May Shift Some of the Fight over Food Labels from Consumers to Competitors.**

The Court's conclusion that the FDCA does not preclude Lanham Act suits by competitors may cause a shift in product labeling litigation. Specifically, consumer product manufacturers may increasingly utilize litigation against competitors in order to solidify or improve market share. It will be interesting to see what if any effect this has on the current flurry of consumer litigation. On the one hand, this may increase consumer litigation as class proponents seek to pile on the litigation efforts of the corporate competitors. Alternatively, this may cause a shift in the litigation environment, as consumers see themselves as competing with the litigation efforts of competitors who may litigate under the more open federal scheme. This supposition is bolstered by the FDA's continued

promulgation of draft and final food labeling guidance, which buoys class action defendants' primary jurisdiction and preemption arguments.

Competitor Labeling Law Suits Brought Under the Lanham Act Stand to Increase.

Through *POM Wonderful*, the U.S. Supreme Court has paved the way for a new battleground in food and beverage labeling litigation—competitor-to-competitor suits. This development raises new litigation risks as well as opportunities.

With regard to new risks, compliance with FDA guidance no longer provides a safe harbor from labeling litigation. If there was any ambiguity before, companies clearly must now consider whether, apart from FDA regulations, their labeling may be viewed by competitors as false or misleading, exposing them to potential Lanham Act litigation. To that end, companies should review existing and contemplated product labels for language that could be viewed as misleading under Lanham Act standards.

On the other hand, this decision also solidifies new opportunities, as companies with strategic advantages stand to benefit from competitor-to-competitor litigation. Market leaders such as POM, which are more entrenched in a particular market, might bring these suits against new entrants or market followers that do not meet the same standards. In addition, companies that hold informational advantages, such as those that invest in extensive research to support their label claims, might find success challenging food and beverage companies with weaker substantiation for label claims. In short, companies are now empowered to police their own markets and eliminate competitor advantages borne by aggressive labeling. Such actions, rather than FDA rules, may either establish market standards or serve as a way to enforce more vigorously existing norms.

The Success of Increasing Competitor Lawsuits May Impact the Number of Consumer-Driven False Labeling Lawsuits Seeking Equivalent Injunctive Relief.

On its face, the U.S. Supreme Court's decision in *POM Wonderful* does not appear to impact consumer-driven false labeling lawsuits. The Court had an opportunity to take a deferential approach and construe the FDCA's failure to create a private right of action as intent for federal agencies to preempt all states laws that otherwise might address food and beverage labels, but it did not do so. In fact, the court stated that its decision had nothing to do with whether state law is preempted by a federal statute or federal agency action. *POM Wonderful LLC*, 2014 WL 2608859, at *7 ("[T]his is not a pre-emption case. . . . This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute.") Nevertheless, *POM Wonderful* could impact the false labeling consumer class action landscape.

The Court's endorsement of competitor suits under the Lanham Act paves the way for companies to accomplish the same remedy—an injunction requiring a product label change—generally desired by and available to consumers under state consumer protection statutes. See, *e.g.*, Cal. Bus. & Prof. Code § 17200 (California's Unfair Competition Law, or "UCL," authorizes injunctive relief and restitution). This in turn may cause a shift in the litigation environment, as consumers may view themselves as competing with the litigation efforts of competitors able to litigate under a more open federal scheme. Alternatively, this decision may increase consumer litigation as class proponents seek to take advantage of the litigation efforts of the corporate competitors.

POM Wonderful's Limitation to a Non-Preemption Context Does Not Disturb the Viability of Preemption and Primary Jurisdiction Defenses.

For those companies faced with consumer litigation under state law, the *POM Wonderful* Courts' commentary on the FDCA and related preemption arguments may also impact consumer-driven false labeling lawsuits. In *POM Wonderful*, the Court acknowledged that the FDCA has an "express pre-emption provision [that] applies by its terms to state . . . law" as a result of Congress' enactment of the NLEA. *POM Wonderful LLC*, 2014 WL 2608859, at *2, *8. Thus, *POM Wonderful* does nothing to impede companies from arguing that state law-based false labeling suits are preempted. If anything, *POM Wonderful* suggests that preemption arguments are viable, at least in certain situations.

Generally, preemption defenses have encountered mixed results across the country. *Compare Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 427 (7th Cir. 2011) (approving preemption defense in case involving label claims regarding fiber) with *Vermont Pure Holdings, Ltd. v. Nestlé Waters N. Am., Inc.*, Civ.A.No. 03-11465 DPW, 2006 WL 839486, at *5 (D. Mass. Mar. 28, 2006) (rejecting preemption defense in a case involving the use of the word "pure" on a product label). Courts tend to agree, however, that the FDCA preempts state law claims relating to food and beverage labels where the statements at issue have been specifically addressed by, and are consistent with, FDA regulations. See *Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2012) ("Carrea's claims regarding the '0g Trans Fat' statement, located on the front of Drumstick's packaging, are expressly preempted by the [FDCA], as amended by the [NLEA]" because the "statement is an express nutrient content claim that the [FDA] not only permits . . . but further instructs."); *Young v. Johnson & Johnson*, 525 F. App'x 179, 182-85 (3d Cir. 2013) (concluding that the NLEA preempted plaintiff's state law claims regarding the phrases "No Trans Fat" and "Proven to Reduce Cholesterol" appearing on a butter/margarine substitute); *POM Wonderful LLC v. Coca Cola Co.*, No. CV 08-06237 SJO (FMOx), 2013 WL 543361, at *3-5 (C.D. Cal. Feb. 13, 2013) (ruling on remand from the Ninth Circuit that the FDCA preempts state laws, which have non-identical labeling requirements); *Bronson v. Johnson & Johnson, Inc.*, No. C 12-04184 CRB, 2013 WL 1629191, at *4-5 (N.D. Cal. Apr. 16, 2013) (holding that plaintiffs' state-law based claim that the nutrient content related text on the label for Splenda Essentials With Antioxidants was preempted because the FDA has promulgated regulations for nutrient content claims). The continued sustainability of preemption defenses following *POM Wonderful* should at least cause the plaintiffs' bar to reevaluate whether to proceed with a consumer labeling suit, particularly where the issue is label text that the FDA has arguably approved.

As with the preemption defense, the *POM Wonderful* Court's express restriction of its holding to a preclusion (as opposed to preemption) context does not vitiate defendants' primary jurisdiction defense. The primary jurisdiction doctrine enables courts to suspend or dismiss a case pending action by an appropriate administrative agency. *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008). Courts apply this doctrine when there is "(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Id.* (citation omitted). The primary jurisdiction defense is generally applicable in food and beverage labeling litigation when the FDA, United States Department of Agriculture ("USDA"), or Federal Trade Commission ("FTC") is actively considering an issue in the litigation.

Of the three administrative agencies that possess regulatory authority over the labeling of food and beverages (FDA, USDA, and FTC), recently the FDA has been most active. Dating back to the beginning of this year, the FDA promulgated draft guidance and solicited public comment for food

product labeling on at least three occasions: (1) on February 27, 2014 the FDA reopened the comment period for draft guidance regarding ingredients advertised as "evaporated cane juice," proposing that such ingredients be referred to as "dried cane syrup" instead; (2) in April 2014, the FDA distributed draft guidance for the proper labeling of honey and honey products; and (3) in May 2014, the FDA distributed draft guidance for food allergen labeling exemption petitions and notifications. In addition, on April 28, 2014, the FDA issued a final rule prohibiting certain nutrient content claims for foods that contain omega-3 fatty acids. The FDA's persistent issuance of food and beverage label guidance and regulations suggests an intention to focus more on product labels than in the past. This active regulatory practice breathes life into company primary jurisdiction defenses in labeling litigation, and eventually may decrease the plaintiff bar's appetite for consumer-driven labeling lawsuits, at least with respect to product labels featuring text addressed by the FDA. This may be particularly true where competitor suits succeed and effectively eliminate injunctive relief as a plausible remedy for consumer claims.

Even if *POM Wonderful* Does Not Discourage or Otherwise Cause a Reduction in Consumer-Driven Labeling Litigation, Class Certification Remains a Challenge.

Even if POM Wonderful does not result in a downturn in consumer-driven labeling litigation, it remains difficult for consumers to attain class certification in labeling cases. Following the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), consumers seeking class certification must establish that damages are capable of measurement on a classwide basis. *Comcast Corp.*, 133 S. Ct. at 1433-34. Although courts have adopted varying approaches to this issue, in many cases it has not proven to be an easy task. Product "sales data alone [does] not provide sufficient information to measure classwide damages." *Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK (VBKx), 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014). "[P]laintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). In addition to the stringent Comcast requirements, consumers must show that there is "some administratively manageable method of determining whether a person is a class member." *In re POM Wonderful LLC*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014) (citation omitted). Such a task is nearly impossible "[i]n [food labeling] situations where purported class members purchase an inexpensive product . . . and are unlikely to retain receipts or other transaction records. *Id*. at *6. *In re POM Wonderful, LLC* is instructive, as in that case the court granted a motion to decertify a class of all persons who purchased a POM Wonderful 100% juice product between October 2005 and September 2010 because the large volume of product sold meant the class might include ten-to-fifteen million purchasers; class members only paid a few dollars per bottle; few customers, if any, were likely to have retained receipts for such a cheap purchase from such a distant, lengthy class period; and there was likely great disparity among class members' rationales for purchasing the product. *Id*. at *1, *5–6.

Conclusion

The *POM Wonderful* decision may be deceptively impactful. Its endorsement of Lanham Act competitor suits could result in a decrease in consumer-driven false labeling lawsuits for products with labels not subject to an FDA pre-approval process because competitor suits may prove a successful, less burdensome route to achieving the label change that underpins many consumer suits. Additionally, because *POM Wonderful* acknowledges the limited preemptive effect of the FDCA on state statutes, and federal agencies continue to promulgate guidance and regulation for product labels, the plaintiffs' bar may be less willing to initiate consumer-driven food labeling suits where viable preemption and primary jurisdiction defenses seem likely to succeed. Even if *POM Wonderful* does not have any impact

on the filing frequency of consumer-driven labeling lawsuits, there may be an eventual reduction in this litigation, as consumers are likely to have continued difficulty convincing courts to certify classes in the food and beverage labeling space in light of Comcast and the ascertainability issues discussed by *In re POM Wonderful, LLC*.

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[1] "(a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—[¶] (2) any requirement for the labeling of food of the type required by section 343(c), 343€, 343(i)(2), 343(w), or 343(x) of this title that is not identical to the requirement of such section, except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343(c) of this title and that is applicable to maple syrup, (3) any requirement for the labeling of food of the type required by section 343(b), 343(d), 343(f), 343 (h), 343(i)(1), or 343(k) of this title that is not identical to the requirement of such section, except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343(h)(1) of this title and that is applicable to maple syrup . . ." 21 U.S.C. § 343-1.

[2] Note, however, that in states that have borrowing statutes, like California's Unfair Competition Law, the FDCA is and can be enforced by private litigants through state law causes of action. *See, e.g., Won Kyung Hwang v. Ohso Clean, Inc.*, No. C-12-06355 JCS, 2013 WL 1632697, at *14 (N.D. Cal. Apr. 16, 2013) ("[C]ourts have found that claims are not preempted by the FDCA where those claims are 'based on parallel state laws that mirror the relevant sections of the FDCA.'") (quoting *Khasin v. Hershey Co.*, No. 5:12-CV-01862 EJD, 2012 WL 5471153, at *4 (N.D. Cal. Nov. 9, 2012); *Salazar v. Honest Tea, Inc.*, No. 2:13-cv-02318-KJM-EFB, 2014 WL 2593601, at *4 (E.D. Cal. June 10, 2014) ("[I]f state law seeks to impose liability consistent with the FDCA, the law is not preempted."); *Loreto v. Procter & Gamble Co.*, 515 F. App'x 576, 579 (2013) ("The [FDCA's] public enforcement mechanism is thwarted if savvy plaintiffs can label as arising under a state law for which there exists a private enforcement mechanism a claim that in substance seeks to enforce the FDCA.").